88-1678

Supreme Court, U.S.
FILED
MAY 9 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1989

RICHARD WALTON,
Petitioner,

v.

SCOTT B. MERRIMAN
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE PEOPLE OF THE STATE OF CALIFORNIA AS AMICUS CURIAE

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QUESTION PRESENTED

Whether an arresting officer may be held personally liable in money damages for violating the Fourth Amendment standard of "probable cause" under circumstances in which the court that withholds qualified immunity cannot cite a single decision demonstrating a breach of "clearly established law."

TABLE OF CONTENTS

	Page
INTEREST OF THE PEOPLE OF THE STATE OF CALIFORNIA	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
AS A MATTER OF LAW, WALTON HAD PROBABLE CAUSE TO ARREST MERRIMAN.	4
CONCLUSION	15

TABLE OF AUTHORITIES

	Page
Cases	
Anderson v. *Creighton* 97 L.Ed.2d 523 (1987)	2
Balistreri v. *Pacifica Police Dept.* 855 F.2d 1421 (9th Cir. 1988)	12
Bivens v. *Six Unknown Named Agents of Federal Bureau of Narcotics* 456 F.2d 1339 (2d Cir. 1972)	7
Brinegar v. *United States* 338 U.S. 160 (1949)	5
Clay v. *Conlee* 815 F.2d 1164 (8th Cir. 1987)	11
Duniway v. *New York* 442 U.S. 200 (1979)	6
Go-Bart Importing Co. v. *United States* 282 U.S. 344 (1931)	6
Illinois v. *Gates,* 462 U.S. 213 (1983)	4
Merriman v. Walton 856 F.2d 1333 (9th Cir. 1988)	5
United States v. *Leon* 468 U.S. 897 (1984)	14
United States v. *Rollins* 522 F.2d 160 (2d Cir. 1975)	10

TABLE OF AUTHORITIES: (Continued) **Page**

United States v. *Ross*
456 U.S. 798 (1982) 6

United States v. *Ventresca*
380 U.S. 102 (1965) 5

United States v. *Williams*
622 F.2d 830 (5th Cir. en banc 1980),
cert. denied, 449 U.S. 1127 (1981) 5

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INTEREST OF THE PEOPLE OF THE STATE OF CALIFORNIA

California's interest in protecting our citizens from criminal violence by protecting our peace officers from personal liability arising from a reasonable decision to arrest brings the State before this Honorable Court as amicus curiae in support of Deputy Sheriff Richard Walton's petition for certiorari. This Court has recognized

that "it is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present, and . . . that in such cases those officials--like other officials who act in ways they reasonably believe to be lawful--should not be held personally liable." (*Anderson* v. *Creighton*, 97 L.Ed.2d 523, 531 (1987).) Reasonableness, the margin for error necessary to induce officers to approach the limits of their authority, has been reduced to a razor's edge by the decision below.

SUMMARY OF ARGUMENT

The United States Court of Appeals for the Ninth Circuit has held Deputy Sheriff Richard Walton personally liable in money damages for arresting Scott Merriman for kidnapping on the strength of a partially corroborated report of an identified, percipient, citizen informer. Although, as a matter of law, the totality of circumstances known to Walton furnished probable cause for Merriman's arrest, the Court of Appeals declared that no reasonable officer could have reached that conclusion. The Court of

Appeals cited no case law supporting its determination. To that extent, the opinion below indicates that the "probable cause" and "clearly established law" standards may coexist only at the cost of forcing peace officers to choose between dereliction of duty and money damages.

The Court of Appeals obscured its holding by reference to Deputy Walton's failure to obtain a warrant or to conduct a further investigation before the suspect's arrest. To that extent, Deputy Walton will not know why he has been held personally liable, the opinion below will not be understood by "reasonably well trained officers," and the "probable cause" rubric henceforth will encompass not only what an officer has learned but what he might have learned, as well as the practicability of obtaining a warrant. The law will have reached a level of complexity making personal liability unfair to officers required to act in the field.

ARGUMENT

AS A MATTER OF LAW, WALTON HAD PROBABLE CAUSE TO ARREST MERRIMAN

A. Reasons for Granting Certiorari

This case exposes serious obstacles to applying the "clearly established law" standard for qualified immunity to a peace officer's determination of probable cause to arrest.

First, this Court has defined "probable cause" as "a probability or substantial chance of criminal activity." (*Illinois* v. *Gates*, 462 U.S. 213, 243 fn. 13 (1983).) "[A]t this level of generality," however, the "probable cause" concept rarely furnishes sufficiently clear guidance that "a reasonable official would understand that what he is doing violates" the Fourth Amendment. (See *Anderson* v. *Creighton*, *supra*, 97 L.Ed.2d at 530-531.)

Second, rather than erecting a probability threshold for official action, "probable cause" balances competing interests in individual privacy and collective security. Thus, Mr. Justice Jackson explained that the constitutionality of a police detention might depend upon

whether its objective was apprehension of a kidnapper or a bootlegger. (*Brinegar* v. *United States,* 338 U.S. 160, 183 (1949) (Jackson, J., dissenting).) Apart from the gravity of the suspected offense, judicial findings of "probable cause" may be informed by considerations other than probability such as the preference for warrants, discounted by the need for immediate action. (*United States* v. *Ventresca,* 380 U.S. 102 (1965); *United States* v. *Williams*, 622 F.2d 830, 842 (5th Cir. en banc 1980), *cert. denied*, 449 U.S. 1127 (1981).) The opinion below adds yet another factor: the opportunity for "further inquiry before effecting a warrantless arrest." (*Merriman* v. *Walton*, 856 F.2d 1333, 1335 (9th Cir. 1988).) From the field officer's perspective, "probable cause" in the abstract is at best a rubric, at worst a rationalization.

Third, proceeding from the abstract to the concrete often does little to aid a police officer's determination that the apparent circumstances do--or do not--constitute probable cause. Decisional law is of limited value to the officer's assessment because "there are so many variables

in the probable cause equation that one determination will seldom be a useful 'precedent' for another." (*Illinois* v. *Gates*, *supra*, 462 U.S. at 238 fn. 11.) "Each case is to be decided on its own facts and circumstances." (*Go-Bart Importing Co.* v. *United States*, 282 U.S. 344, 357 (1931).) For purposes of defining the scope of qualified immunity for police officers, the standards of "probable cause" and "clearly established law" are a bad fit.

Unlike the clearly articulated "bright line" rules set down in, for example, *United States* v. *Ross*, 456 U.S. 798 (1982) and *Duniway* v. *New York*, 442 U.S. 200 (1979), constitutional "standards," including "probable cause," require an exercise of judgment in addition to a knowledge of the law. Accordingly, if the standards of "probable cause" and "clearly established law" are to coexist without demanding that peace officers choose between dereliction of duty and money damages, courts cannot simply substitute their own judgment for that of officers acting in the field. Had the Ninth Circuit done no worse to Deputy Walton, the State of California, as

amicus, would urge plenary review on the grounds that qualified immunity permits police officers reasonable mistakes and that reasonableness imports a degree of judicial sensitivity to the complexity of a determination that now requires an officer to evaluate: what he already knows; what he might learn by further investigation; whether time permits additional inquiry; whether it is practicable to obtain an arrest warrant.

B. Reasons for Summary Reversal

In our view, however, the opinion below did not merely confuse constitutional "reasonableness" with "reasonableness" in the tort sense. (See *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 456 F.2d 1339, 1348-1349 (2d Cir. 1972) (Lumbard, J., concurring) (*Bivens II*).) Instead, the Ninth Circuit held constitutional police conduct actionable; in other words, probable cause for Merriman's arrest existed as a matter of law. Consequently, the People of the State of California support petitioner's request for summary reversal.

We begin with the information known to Deputy Walton before Merriman's arrest. About 11:00 p.m. on July 16, 1986, William Ivey, half-brother of Wendy Cantrell, called the Sheriff to report Wendy's possible kidnapping. Deputy Walton responded to the Ivey residence. Ivey told Walton that Wendy's friend, Kim Martinez, had telephoned that Wendy's ex-boyfriend, Scott Merriman, had confronted the two women outside the Clam Beach Inn. Merriman then followed them to a location where he dragged Wendy Cantrell kicking and screaming from her vehicle into his automobile and drove away. Ms. Cantrell yelled to Ms. Martinez to call the police. Merriman told Martinez, "You can call whoever you want, I've got keys to the cabin and that's where I'm taking her." Within the hour, Martinez repeated her story to another member of the Sheriff's Office, who told Walton that the eyewitness had confirmed the abduction. (*Merriman* v. *Walton*, *supra*, 856 F.2d at 1334; Pet. for Cert., p. 3.)

By 2:00 a.m. on July 17, 1986, Walton requested an all points bulletin because he could not locate Merriman or Cantrell and because he had found Merriman's residence unoccupied and his car missing. When Walton returned to duty at 4:00 p.m., he learned that Officer Kirkpatrick had been unable to find either Merriman or Cantrell that morning and that Merriman had contacted the Sheriff's Office to advise that he would be at home after 5:00 p.m. Not finding Merriman there, Walton went to Ivey's residence. Ivey informed the deputy that he had seen Wendy Cantrell at noon, that her face was cut above the eye and her nose was scratched, that she said she had spent the night at Elaine Howell's cabin, and that she told Ivey she had been "messed up on booze and drugs" and could not remember what had happened. Cantrell left at about 2:00 p.m. without telling Ivey where she was going. (*Merriman* v. *Walton*, *supra*, 856 F.2d at 1334; Pet. for Cert., p. 4.)

Deputy Walton found Merriman at the Howell residence. Merriman admitted following Cantrell and

Martinez from the Clam Beach Inn and taking Cantrell in his car to a house near the Howell residence, where the two spent the night. Merriman denied forcing Cantrell to accompany him and claimed Cantrell and Martinez had been fighting. Walton arrested Merriman. At her deposition, Cantrell stated that she had telephoned the Sheriff's Office about 2:00 p.m. on July 17, 1986 explaining that she had not been kidnapped but would seek a restraining order to keep Merriman away. Detective Vulich of the Sheriff's Office said he received such a call from Cantrell at 3:25 p.m. on the following day, July 18, 1986. In any event, Walton was not shown to have learned of Cantrell's call before arresting Merriman. (*Ibid.*)

When the informer is an identified citizen who witnessed the crime, reliability may be presumed. (See *United States* v. *Rollins*, 522 F.2d 160, 164 (2d Cir. 1975) and cases cited therein.) Martinez's information that Cantrell had been forcibly abducted was corroborated by Cantrell's absence during the night of July 16, 1986, by her

half-brother's report of her subsequent injuries, and to an extent by Merriman's admissions to Walton. Probable cause existed as a matter of law unless Walton was required to discredit Martinez on the basis of Merriman's denial of force and explanation that Cantrell and Martinez had fought. (Cf. *Clay* v. *Conlee,* 815 F.2d 1164, 1168 (8th Cir. 1987).) Considering that Martinez had immediately brought Cantrell's predicament to the attention of Ivey, and had repeated her accusation to the Sheriff's Office at the risk of civil and criminal liability, and that Merriman's self-serving explanation was made in an accusatory setting after Merriman had ample time to reflect on his situation, it was not unreasonable for Walton to find Martinez more credible than Merriman.

The Ninth Circuit reached a contrary conclusion because "Walton knew the alleged victim of the kidnapping had returned. Walton knew that Merriman, the alleged perpetrator, was a local school teacher who was Cantrell's long-time boyfriend. Walton knew that Merriman had telephoned the police station and stated he

was available for police questioning . . . [and] wa cooperative and volunteered his version of wha happened. . . . A reasonable police officer would hav made further inquiry before effecting a warrantless arrest (*Merriman* v. *Walton*, *supra*, 856 F.2d at 1335.)

That Wendy Cantrell returned did not mean tha she had not been forcibly abducted. Equally important t any officer familiar with domestic disputes, so long as bot Merriman and Cantrell were at large there remained th danger of additional violence. (See *Balistreri* v. *Pacific Police Dept.*, 855 F.2d 1421, 1426-1427 (9th Cir. 198 (police had duty to protect abused wife from husband) Petitioner points out that Merriman had been describe by Martinez as Cantrell's "ex-boyfriend" and that "there no evidence Deputy Walton knew Merriman wa 'Cantrell's long-time boyfriend. . . .' Further, there is n evidence Deputy Walton knew Merriman was 'a loca school teacher. . . .' In fact, Merriman admitted at h deposition that he had no teaching credential and that h quit his teaching job in February 1985." (Pet. for Cert.,

10 fn. 7.) It is true that Merriman, obviously aware that the police were looking for him, called the authorities in order to "volunteer" his essentially exculpatory version of the relevant events. Were a suspect's denial to foreclose probable cause, it would be difficult to arrest anyone. *Amicus* finds Merriman's denial, emphasized below, far less probative than Cantrell's injuries, ignored below.

Particularly troubling are the implications of the penultimate sentence of the Court of Appeals' opinion: "A reasonable officer would have made further inquiry before effecting a warrantless arrest." (*Merriman* v. *Walton*, *supra*, 856 F.2d at 1335.) Considering that the Sheriff's Office had talked with the victim's brother, the percipient witness, and the suspect, and that the victim's present location was unknown, of whom should Deputy Walton have made further inquiry? How long was the deputy constitutionally required to await the victim's reappearance? Is the "probable cause" requirement an appropriate vehicle for judicial control of the scope of a police investigation? Can police reasonably be expected

to enter into their probable cause calculation what they might be able to learn as well as what they have learned?

Does the Ninth Circuit imply that had a magistrate issued an arrest warrant based on all information known to Deputy Walton, Merriman's arrest would have been lawful, or only that Walton would not be personally liable? Is Walton held liable because: (a) he lacked probable cause; (b) he failed to seek an arrest warrant; (c) he failed to make further investigation; (d) all of the above? Will a "reasonably well trained officer" reading the opinion below understand where Deputy Walton went astray? (See *United States* v. *Leon*, 468 U.S. 897, 922 fn. 23 (1984).)

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CONCLUSION

The People of the State of California respectfully urge that Deputy Walton's petition for writ of certiorari be granted and that the judgment of the Court of Appeals be summarily reversed on the ground that, as a matter of law, there existed probable cause for Merriman's arrest.

DATED: May 4, 1989

Respectfully submitted,

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CERTIFICATE OF SERVICE BY MAIL

No. 88-

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CLIFFORD K. THOMPSON, JR., a member of the Bar of the Supreme Court of the United States, states:

That his business address is 350 McAllister Street, Room 6000, in the City and County of San Francisco, State of California; that on May 9, 1989, he served true copies of the attached Brief for the People of the State of California as Amicus Curiae in the above-entitled matter on counsel for respondent and petitioner by placing same in envelopes addressed as follows:

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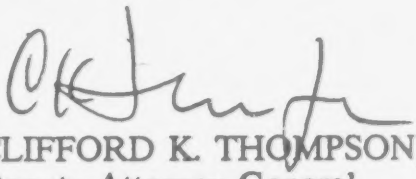
Said envelopes were then sealed and deposited in the United States mail at San Francisco, California, with the postage thereon fully prepaid.



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